

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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DEPARTMENT OF AMZONAS,

00 CV-2881

Plaintiff,

-against-

United States Courthouse  
Brooklyn, New York

PHILIP MORRIS COMPANIES, INC.,

Defendant.

September 29, 2000

----- X 10:30 o'clock a.m.

TRANSCRIPT OF MOTION  
BEFORE THE HONORABLE NICHOLAS G GARAUFIS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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BY: IRVIN B. NATHAN, ESQ., and  
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1 Court Reporter: Henry R. Shapiro  
2 225 Cadman Plaza East  
3 Brooklyn, New York  
4 718-254-7212  
5

6 Proceedings recorded by mechanical stenography, transcript  
7 produced by computer.  
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9

10 MR. MALONE: Good morning, Kevin Malone for the  
11 plaintiff.

12 MR. NATHAN: Irvin Nathan for Philip Morris for the  
13 defendants. With me is Craig Stewart of my office.

14 THE COURT: This case has been reassigned from Judge  
15 Nickerson and there is a motion. I haven't had a chance,  
16 obviously, to read all of this, but I certainly will and why  
17 don't you start and I may ask some questions along the way,  
18 since I don't know anything about this case, except what I  
19 heard in the last half hour.

20 MR. NATHAN: I'm pleased to argue this morning, if  
21 it's Your Honor's choice. After Judge Nickerson told us that  
22 he was unable to continue in the case, counsel for the  
23 plaintiffs and I consulted and agreed, if it was agreeable to  
24 the Court, we'd be happy to postpone this matter until the  
25 earliest time the Court is available after the Court has a

1 chance to read the papers.

2 Frankly, it would be my preference if the Court would  
3 have a chance to read it, consistent with your schedule and  
4 the schedule for counsel for the plaintiffs, we're happy to  
5 come back. It's not a problem.

6 THE COURT: That is fine with me. I don't want to  
7 delay anything, which might be perhaps earth shaking  
8 consequences if we waited. You have all done a lot of work  
9 here and it's through no fault of yours or anyone else that  
10 this case was reassigned, so if you feel that you would like  
11 to give me a little time to look through the material and do  
12 whatever research we want to do, that would be fine with me.

13 If you would like to give me some background on the  
14 case, that might also be helpful and we could set down oral  
15 argument for the motion. This is an opportunity, you are all  
16 here, you spent a lot of time in the courthouse this morning,  
17 and I would want to hear a little from you. I will then bring  
18 in my courtroom deputy and we'll set a date for a full oral  
19 argument and then we'll recess until then.

20 MR. NATHAN: That would definitely be our preference.  
21 Mr. Malone representing the plaintiffs is leaving the country  
22 and will be back after October 10th, and if we set the first  
23 date available after October 10th, that was available to the  
24 Court, would be agreeable to us, and we agreed to put off  
25 other dates pending a decision.

1 THE COURT: That is agreeable to me.

2 MR. NATHAN: Let me say briefly, your Honor, it's our  
3 motion to stay this matter pending a dispositive decision in  
4 the Second Circuit. The case that was decided by Judge  
5 McAvoy, a case that was brought by the government of Canada  
6 against RJR and one thing that I can -- two things that I  
7 would like to bring to your attention that are new  
8 developments since we filed our papers.

9 There is a briefing scheduled in that appeal in the  
10 Second Circuit and those briefs will be filed in October, for  
11 the appellants in November or the appellees and the oral  
12 argument is indicated it would be sometime in January. The  
13 order says no sooner than January 8th and I'm informed that  
14 means three or four weeks after.

15 THE COURT: It's not an expedited appeal?

16 MR. NATHAN: It will be heard by January. The second  
17 development since we filed our papers, Your Honor, is that the  
18 plaintiffs have filed an amended complaint and named five  
19 additional British-American tobacco companies, and several  
20 foreign companies, who have not yet been served.

21 THE COURT: This is in that case?

22 MR. NATHAN: In this case.

23 THE COURT: We're back on this case?

24 MR. NATHAN: We're back in this case. That's the  
25 appeal in that case. The second development that happened

1 since we filed our papers is that the plaintiffs have amended  
2 their complaint, they have added five new defendants, these  
3 are all British-America tobacco defendants, many of them  
4 overseas, and to my information, at least most, if not all,  
5 have not yet been served.

6 THE COURT: Could I just ask the question of the  
7 plaintiff's counsel. Do you expect that these named  
8 defendants would be served in the next month or week?

9 MR. MALONE: Your Honor, I believe two or three have  
10 been served, and one or two of them will probably take a  
11 couple of weeks because they are UK companies. But we should  
12 have them all served within three weeks.

13 THE COURT: Thank you.

14 MR. NATHAN: And Your Honor, what I believe this  
15 means is that the briefing in these issues, which I will  
16 describe in a moment, take place simultaneously with the  
17 briefing in the Second Court, and by the time the Court could  
18 get to hear it and decide, we'll certainly have argument in  
19 the Second Circuit and maybe have a decision.

20 If I could briefly describe it, to give a background  
21 and not to argue the case. The key question here is the  
22 subject matter jurisdiction to hear a case. The plaintiffs  
23 are departments, which are subunits of the central government  
24 of Colombia, Colombia is a unitary state. These are not  
25 independent states, not a federation, these are subunits of

1 the central and only unitary government, which is not a party  
2 to this case and they have brought this action -- they brought  
3 it originally for import duty and excise taxes. In the  
4 amended complaint they dropped their claim for the import  
5 duties and focusing on the excise taxes on cigarettes that  
6 they originally lost. Our principal contention in dealing  
7 with the subject matter jurisdiction is based on the Revenue  
8 Rule, which is a rule that has been applied in Common Law for  
9 over two hundred years, and it's universal that one state  
10 cannot come into another state and use its courts to assess  
11 and collect taxes. That applies even to states within the  
12 U.S. and clearly applies to foreign government's. That is  
13 what Judge McAvoy's ruled in dismissing the Canadian case.  
14 That is what is in appeal in the Second Circuit.

15 THE COURT: You believe, if the Second Circuit  
16 affirms Judge McAvoy's decision it would dispose of all the  
17 issues raised in this case?

18 MR. NATHAN: The issue is subject matter  
19 jurisdiction. If the Court does not have jurisdiction to hear  
20 the claim for foreign taxes, that's the only claim for relief,  
21 there is also -- there is a claim, in addition to taxes, a  
22 claim for increased law enforcement expenditures. Our view is  
23 that is covered by the same rule.

24 THE COURT: These are pendente claims?

25 MR. NATHAN: There are some pendente claims as well

1 under Common Law. The relief sought is all about the taxes  
2 and law enforcement and other sovereign expenses that the  
3 government, the departments allegedly had here.

4 Your Honor, the reason I think that it makes sense to  
5 stay and wait to see what the Second Circuit does on that  
6 dispositive issue, if we're to go forward there is a hoist of  
7 other issues, that the Court would have to address.

8 In addition, we'd present to the Court, obviously if  
9 the Court agreed with Judge McAvoy's, you wouldn't have to  
10 reach it, but the other issues that would be brought on which  
11 would take a lot of briefing and argument and evidentiary  
12 matters, would also relate to subject matter jurisdiction.

13 The issues that we'll present relates to the fact  
14 that it's the departments as opposed to the central government  
15 that is bringing this action and those issues relate to  
16 whether sovereigns that are not recognized by the U.S.  
17 government, can have standing-- seek sovereign relief in the  
18 U.S. courts-- whether Colombian law authorizes these  
19 departments-- to bring this action to collect taxes, and  
20 because we have a peculiar situation in Colombia, which is a  
21 country that basically is in the midts of a Civil War.

22 One of the issues is to what extent are these  
23 departments in control of their territories, at least from the  
24 executive branch statements, the State Department has talked  
25 about it, there is a swath of Colombia, which includes a

1 number of these departments, is supposed to be the size of  
2 Switzerland that have been ceded to the rebels, for them to  
3 govern and administer, and that also raises issues. Beyond  
4 those issues --

5 THE COURT: Having been in the executive branch  
6 myself and dealt with State Department pronouncements on  
7 issues like this, if that were an issue as to opposed to  
8 whether the entity had the standing-- whether the entity as it  
9 exists had the standing -- I think that might be an evidentiary  
10 question for us as opposed to a pure question of law.

11 MR. NATHAN: I agree with that. What I'm  
12 suggesting -- beyond that there are a number of legal issues,  
13 under RICO, whether a sovereign can collect taxes, whether  
14 taxes or law enforcement expenses are business, property  
15 under RICO, whether RICO extends to the damages here. It's a  
16 fact, Your Honor, that RICO does not include smuggling or tax  
17 offenses. Those are not predicate acts under RICO and that is  
18 what this case alleges, there is smuggling into Colombia and  
19 failure to pay taxes, and even smuggling into the United  
20 States, and failure to pay United States taxes are not a  
21 predicate under RICO and failure to pay taxes and smuggling in  
22 Colombia are not intended to be covered.

23 All I'm suggesting it's a waste of the Court's time  
24 and the parties to be briefing and arguing these matter when  
25 in the matter of months the Second Circuit will hand down what



1 we think will be a dispositive issue with respect to all of  
2 the issues in this matter and again without -- I don't want to  
3 argue this matter, just to give you the background for one  
4 more minute.

5 In May of 1999, which is over a year ago, a year and  
6 a half ago, the governors of many of these plaintiffs  
7 announced that they were going to sue Philip Morris and BAT on  
8 this claim. They didn't file that suit until May of 2,000.  
9 One year later they filed a lawsuit and then when they filed  
10 it. They only filed it against the Philip Morris Companies,  
11 when they filed it they didn't serve the complaint on us for  
12 about three months after they filed it. After we were served,  
13 then about another month later they amended the complaint to  
14 add, as I mentioned before, the British-American Tobacco  
15 co-defendants and as you heard they haven't yet served them,  
16 but they're in the process and I assume they will in the near  
17 future serve those defendants, and I again point out that the  
18 Republic of Colombia, which is the only government for the  
19 territory that has been recognized by the U.S. Government has  
20 not sued at all. So that our suggestion is that there is not  
21 any prejudice here and there are activities that have been  
22 quite leisurely in bringing the suit, and serving the suites  
23 and in naming the parties, suggest if the Court would defer  
24 for just a brief time until we have a decision from the Second  
25 Circuit, it would conserve certainly the Court's resources and

1 the parties and enabled us to move head at that point.

2           What we propose is exactly what Judge Nickerson did  
3 in a case that is cited in our materials, in which there was  
4 an issue that was pending in the Second Circuit, had to do  
5 with the evidentiary weight to be given to a report by a  
6 chiropractor and the judge said, it's the same issue that is  
7 in the Court of Appeals, let's wait until what the Court of  
8 Appeals does, but the moving party, within two weeks after the  
9 Court of Appeals has ruled, you make your motion and we'll  
10 have the hearing on the affect --

11           THE COURT: But here you are only seeking a stay, you  
12 are not seeking a dismissal.

13           MR. NATHAN: For current purposes just a stay until  
14 we have the decision by the Second Circuit.

15           THE COURT: Why wouldn't you seek dismissal if you  
16 are os sur of the jurisdictional issue?

17           MR. NATHAN: We can do that.

18           THE COURT: I'm not proposing it to you, I'm trying  
19 to understand why, if you have Judge McAvoy's decision and you  
20 think it's on all fours with this situation, why wouldn't you  
21 seek a dispositive action by this Court?

22           MR. NATHAN: We are going to do that, and we're ready  
23 to. When we do that, we have to deal with all of these other  
24 issues at the same time and so it's quite a lengthy brief and  
25 a lot of issues to be dealt with and we think it's going to be

1 simplified by the Second Circuit and I think that even though  
2 we could brief it and argue and the Court could have an  
3 opportunity to consider it, with all due respect, the decision  
4 of the Second Circuit, which will govern, no matter which way  
5 this Court goes on the motion, will be out within a short time  
6 after that decision.

7 THE COURT: In the spring, perhaps, or it could be  
8 sooner.

9 MR. NATHAN: We don't know the time. Thank you.

10 THE COURT: Mr. Malone.

11 MR. MALONE: Yes, Your Honor. Thank you. We're in  
12 an odd situation. On the one hand we agreed not to argue, but  
13 we're kind of arguing it.

14 THE COURT: Since I am new with it and also in the  
15 Court it's useful for me if you gave me a sense of the case.  
16 Ordinarily, when a motion is made, the judge sits with the  
17 papers, without the benefit of any kind of discussion before  
18 hand, and this just gives me a little bit of extra help in  
19 addressing the issues that are here so I would appreciate it.

20 MR. MALONE: If I start going off please feel free to  
21 cut me off. I would like to give the Court an explanation of  
22 the underlying case. This case in one sense is about cigarette  
23 smuggling, but in a greater sense it's a money laundering  
24 case.

25 The underlying facts of the case are that Colombian

1 narcotics smugglers smuggle huge volumes of narcotics into the  
2 United States, and then in order to launder that money, they  
3 go through a process called the "black market", pay so  
4 exchange, and then they buy billions and billions of  
5 cigarettes manufactured by the defendants, which they then  
6 smuggle into Colombia as a means of laundering their narcotics  
7 money. I think it's very important that you understand this,  
8 because this case has nothing to do with the Canadian case.  
9 It's nothing like the Canadian case.

10           There, Indians in the Mohawk Indian Reservation, were  
11 smuggling cigarettes across the boarder in order to make money  
12 on cigarettes. Here some of the most dangers narcotics  
13 traffickers in the world are laundering billions of dollars of  
14 money by trading in these cigarettes.

15           Now, we have alleged and I assure you will prove that  
16 not only do Philip Morris and BAT know they were selling to  
17 narcotics traffickers, but they actually maintain these people  
18 as long term clients and at the point where I get to make a  
19 full argument on this, we'll show you the evidence that we  
20 have where documents from Philip Morris's own records show  
21 well known narcotics smuggler are listed as some of their  
22 biggest clients.

23           It's very important to understand, this is not some  
24 sort of run of the mill case where some Indian where running  
25 across the border with some cigarettes. It's crippling

1 Colombia. There is a statement from James Johnson of the  
2 Treasury, Undersecretary for Enforcement of the U.S. Treasury,  
3 at the time we filed, as a supplemental paper, I'll file this  
4 with the court. It says very specifically this is the most  
5 insidious form of money laundering the U.S. government had to  
6 deal with. He will talks about how it's destroying the fabric  
7 of Colombian society and how it's of utmost urgency that this  
8 be suppressed.

9 THE COURT: What about the jurisdictional issue? Who  
10 exactly are your clients?

11 MR. MALONE: My clients -- it's a little misleading  
12 because you hear the word "departments", you think they're some  
13 sub-part of the Colombian government. Departments of Colombia  
14 are the same as the states of the United States. Each one has  
15 a governor, each one has a legislature, each has the right to  
16 levy its own taxes, each has its own budget.

17 In this case the subject matter of this case is  
18 excise taxes, which are levied by the departments, which are  
19 collected by the departments and which in many cases are the  
20 sole source of funding for schools and medical care for the  
21 citizens of that state.

22 In fact, for the purposes of this argument I will use  
23 the word "state" because I think it's important to understand  
24 there is no doubt whatever that my clients have the legal  
25 authority to proceed with this claim.

1           If we get to the point of a motion to dismiss or an  
2 evidentiary hearing, we have letters from the central  
3 government of Colombia confirming my clients' legal right to  
4 proceed with this claim.

5           The defendants want to create this specter there is  
6 this big complicated legal issue. It's an undisputed matter  
7 of law, both in the matter of the states and the Colombian  
8 central government, that my clients have the absolute right to  
9 proceed with this matter.

10           THE COURT: As a matter of judicial efficiency, what  
11 would be the prejudice, to your clients if we simply waited,  
12 as the defendants propose, wait for the Second Circuit to rule  
13 on the issue in the Northern District case?

14           MR. MALONE: There are numerous areas of prejudice.  
15 There are some matters of extreme prejudice that I would like  
16 to emphasize briefly to the Court. Since my clients first made  
17 their announcement that they intended to proceed forthwith  
18 with this case, my clients have been the targets of an  
19 unprecedented campaign of threats and imitation by Philip  
20 Morris and BAT.

21           Let me give you some of the examples that we cited in  
22 our papers. It's undisputed, in fact Philip Morris has not  
23 attempted to deny, Philip Morris has encouraged illegal  
24 lobbying of the United States House of Representatives in  
25 regard to the recent Colombian aid package that was passed-- a

1 one point three million dollar aid package, which was crucial  
2 to the Colombians. Philip Morris never registered the lobby  
3 on behalf of that, and yet Philip Morris did lobby on behalf  
4 of the Colombians on that issue. That would be fine except for  
5 what good they did. Armando Sobalvarro, who was the  
6 vice-president of Philip Morris International calls up my  
7 clients and says, we're doing this important lobbying for the  
8 central government, and it would be damaging to your  
9 government if you go ahead with these lawsuits. Armando  
10 Sobalvarro several meaning later went to Dr. Arias, the  
11 Executive Director of Colombian Federation of Departments, the  
12 spokesman for the governors, and he threatened him outright. He  
13 said, if you move forward with these cases, there will be  
14 blood. That's the phrase that he used.

15 Your Honor, there has been a constant course of  
16 threats and intimidation against my clients by Philip Morris  
17 and BAT ever since this started. If you get a chance to look  
18 at our papers closely you will see that BAT actually has  
19 entered into a so-called consulting contracts with numerous  
20 high profile political figures in Colombia, including one  
21 individual who has already announced his candidacy for  
22 president, are being paid charge quarterly payments in  
23 exchange for them conducting various political maneuvers,  
24 directly contacting and attempting to intimidate my clients  
25 into dropping this suit.

1           Your Honor, conduct of this type will be sanctionable  
2 anywhere, but in a place like Colombia, where the political  
3 structures are much more pliable, these tactics are having a  
4 pervasive and chilling effect on my clients.

5           There is a very substantial probability that the  
6 Second Circuit won't enter a ruling in this matter for a year  
7 or so, and I will explain why that rule is not-- will not be  
8 dispositive.

9           My clients are going to be under huge pressure and  
10 undue intimidation tactics from the defendants if this -- if  
11 we're not allowed to go forward.

12           Next, Your Honor, and this goes directly to the case  
13 law on the matter. There is a very severe risk of loss of  
14 evidence if we're not allowed to proceed immediately. We  
15 provided to the Court documentary proof that Philip Morris has  
16 a document destruction policy, which is currently in place and  
17 ongoing. That destruction process is mandatory and automatic  
18 and interestingly enough it's specifically says that all  
19 documents relative to exported cigarettes will be destroyed.

20           If we wait until year there is going to be another  
21 years worth of documents directly germane to our case that  
22 will be destroyed by Philip Morris.

23           Now, we already know that many boxes of documents  
24 that are important evidence in our case have been destroyed,  
25 because there is evidence at the depository in Minnesota,



1 which up to a certain point has Philip Morris records in it  
2 and we know from their records of the destruction of records  
3 in that depository. There are page after page of boxes of  
4 documents that have been destroyed by Philip Morris already,  
5 and they relate to companies that we know for a fact are  
6 directly involved in the smuggling process.

7           Let me just give you one example, Your Honor. There  
8 is an individual in Colombia known as Santo Lopesierra. He's a  
9 well known narcotics smuggler. Pleadings filed the United  
10 States Department of Justice as early as 1994 detail his  
11 activities smuggling narcotics into the United States. In  
12 Colombia, Santo Lopesierra is known as the Marlboro Man. He's  
13 known as the Marlboro Man because he is one of Philip Morris  
14 biggest customers in the world. Records from '91, '92, '93,  
15 that we were able to retrieve from the depository, reflect  
16 that Santo Lopesierra was a direct customer of Philip Morris.  
17 He's listed by name.

18           We have the information of the volumes, how many he  
19 purchases, the prices, the detail of the sale to this known  
20 narcotics smuggler. However, we don't have that information  
21 for recent years, even though we can prove that they were  
22 selling cigarettes to Santo Lopesierra, at least up to the end  
23 of 1999.

24           If another year goes by and we don't get access to  
25 the documents we'll continue to lose our evidence, not only to

1 prove the smuggling itself, but the crucial evidence that we  
2 need to prove the volumes for the purpose of showing what our  
3 damages are.

4 In other words, we can show though that that Philip  
5 Morris is knowingly selling to narcotics smugglers. Unless we  
6 have Philip Morris records we won't be able to assess the  
7 volumes and accurately says the damages. I wanted to --

8 THE COURT: Finish up if you can.

9 MR. MALONE: Let me make one or two more points. I'll  
10 be very brief. I'm sorry for going this long. It's important  
11 to understand that a substantial number of the witnesses in  
12 this case are criminals. Philip Morris was selling directly  
13 to criminals. Now, these criminals, many of whom are  
14 available to us now --

15 THE COURT: Are they named defendants?

16 MR. MALONE: They are not named defendants.

17 THE COURT: But they are witnesses?

18 MR. MALONE: They are witnesses.

19 THE COURT: Potential witnesses.

20 MR. MALONE: Correct. They had direct face to face  
21 meeting with the cigarette companies, they have documents  
22 reflecting the relationship with these cigarette companies.  
23 Right now, we have access to those witnesses and some of them  
24 are willing to testify. But we're dealing with criminals,  
25 Your Honor, if a year passes some of them will be dead, some

1 of them now in jail will be out of jail, some of them are free  
2 right now, will be indicted, and that evidence is going to go  
3 away.

4 Your Honor, the prejudice to us of a delay is  
5 overwhelming. I would like-- to just point out to Your Honor  
6 the case law is very simple and controlling. Clinton versus  
7 Jones sets forth that it would be reversible error on the part  
8 of the Court to issue a stay where there is a potential for  
9 damage to the plaintiff, without an evidentiary showing that  
10 there would be no harm to us. If you look at the papers filed  
11 by the defendants they have not set forth one single argument  
12 that they would be prejudiced by going forward. They have not  
13 set forth one single argument that they would be harmed if the  
14 case went forward.

15 In contrast we have filed affidavits and other  
16 evidence showing great harm to us and the defendants have done  
17 nothing whatsoever to rebut that. Under Clinton and under  
18 Landis and the other cases that we have cited there frankly is  
19 no way that a stay could be granted, Your Honor.

20 Let me be very breaf on the issue that the defense  
21 tried to argue. They are patently incorrect. If I may, Your  
22 Honor, defense counsel argued the Revenue Rule is a rule of  
23 jurisdiction. It is not a rule of jurisdiction in any sense  
24 of the word. It's a rule of discretion. It's almost like  
25 foreign convenience, it gives Your Honor the discretion to

1 decline to review a case that may involve revenue. But it's  
2 not jurisdictional. And we have cited in our papers the  
3 letter opinion by Judge Matthew Jamison, a judge who wrote  
4 several opinion on the Revenue Rule in the State of New York,  
5 and he will tell you unequivocally his opinion that this is  
6 not a rule of jurisdiction.

7         Nothing is going to be disposed of before the Second  
8 Circuit. Next, Your Honor, I think this is a very important  
9 point to understand. No one has disputed the fact that the  
10 Revenue Rule would be superseded by a treaty. Judge McAvoy's  
11 in his ruling addressed the treaty issue and ruled that the  
12 treaty between Canada and U.S. does not supercede the rule. We  
13 get to a point of a motion to dismiss. You will see the  
14 treaties and treaty history between Colombia and United States  
15 do supersede the rule. Colombia has complete reciprocity with  
16 the United States on tax matters. Canada did not.

17         So, nothing the Second Circuit is going to do is  
18 going to deprive you of jurisdiction, nor give you real  
19 guidance on this, because until you look at the treaty and you  
20 look at the underlying facts of the case, you are not going to  
21 have any basis for ruling anyway.

22         If the defendants really believe that they have any  
23 prayer in the world of prevailing on a motion to dismiss, I  
24 would respectfully submit to the Court that they should  
25 withdraw this motion for a stay and let's get onto the motion

1 to dismiss. If they are right, fine, if they are wrong, the  
2 fact there are other things that you should hear as well, that  
3 is what courts, Your Honor, and in light of the overwhelming  
4 prejudice that we're suffering, we feel there is no basis at  
5 all for waiting on a ruling from the Second Circuit that  
6 cannot possibly dispose of these issues.

7 Last point, Your Honor. They pointed to a in by Judge  
8 Nickerson. Judge Nickerson granted a stay. That is because  
9 the moving party, the government asked for the stay. We are  
10 not asking for a stay, Your Honor.

11 In that case the government filed a motion, then  
12 asked for a stay of their own motion. That's fine. That is  
13 not what is happening here, Your Honor.

14 THE COURT: You had an opportunity to say a lot more  
15 than the basics. I appreciate it and I would like you to have  
16 an opportunity, if you have anything else to add, and I have a  
17 couple of questions.

18 MR. NATHAN: I will start with this jurisdictional  
19 issue. This is no question that Judge McAvoy's said it and  
20 Judge Nathan and Judge Learned Hand and a Justice Hand said  
21 it, with all due respect to the retired judge from New York,  
22 who has filed his opinion. We said in our brief there is no  
23 judicial opinion in the country, which accepts jurisdiction in  
24 this case, and they conveniently got a judge to sign a letter  
25 that was written by a judge for whom Mr. Holloran clerked.

1 This is just advisory advise.

2 With respect to the treaties. There is no treaty that  
3 is referenced in any of the papers or in their complaint.

4 There is no tax treaty with Colombia, which would authorize  
5 Colombia to come to the courts of the United States to enforce  
6 their tax laws.

7 With respect to the taxes, the excise taxes,  
8 Mr. Malone unfortunately misspoke. These departments do not  
9 levy these taxes. These are not the taxes that are levied by  
10 the departments. The excise tax on cigarettes is exclusively  
11 a national tax of the Republic of Colombia authorized by the  
12 national legislature, signed by the president of the country  
13 who is not a party and the legislature in Colombia  
14 specifically prohibits these departments from levying taxes on  
15 cigarettes or alcohol. We'll get into it when we file our  
16 briefs.

17 With respect to the illegal lobbying in the United  
18 States by Philip Morris, obviously, A, it's not true, and B,  
19 it's totally irrelevant to either the complaint or to the stay  
20 motion and as to the chilling effect, doesn't seem owe we deny  
21 there had been any effort to chill, but there is no chill  
22 here. They filed their lawsuit and they are prepared to go  
23 forward with it.

24 The most significant thing I want to tell you with  
25 respect to the documents that Mr. Malone could not be more

1 incorrect about that. When this lawsuit was filed, Philip  
2 Morris suspended all of its document retention policy. Every  
3 document that existed when the lawsuit was filed is  
4 preserved. I have no reason to believe that any document that  
5 existed when the lawsuit was filed have been lost since that  
6 time or lost during the pendency of the suit and, you have our  
7 word on that, that the documents, whatever were there when  
8 they filed the suit will be there. There was a document  
9 retention policy before that.

10 THE COURT: What is that policy?

11 MR. NATHAN: I don't know. I think with respect to  
12 sales records they keep it for five years or something like  
13 that, that kind of thing, so whatever was there when the suit  
14 was filed is still there and will be there and there is no  
15 destruction of documents going on and so a stay would have no  
16 effect with respect to the documents.

17 Your Honor, I think I will leave it there. Those are  
18 the points I wanted to make in response. I would be happy to  
19 answer any questions.

20 THE COURT: That is fine. With respect to the  
21 documents I will direct that no documents -- I accept your  
22 representation, but just so the company doesn't by  
23 inadvertence cause any documents to be destroyed  
24 administratively, and so you can be in a position to tell your  
25 client that it's the Court's wish. I'm going to direct that

1 no documents, which may be relevant to this action, be  
2 destroyed or --

3 MR. NATHAN: Agreeable to us, Your Honor.

4 THE COURT: -- mishandled in any way, in the event  
5 they're need he for discovery and trial.

6 MR. MALONE: Just for clarify, does that apply to  
7 BAT?

8 THE COURT: Where is BAT?

9 MR. NATHAN: They haven't been served. They are not  
10 present.

11 MR. MALONE: May I speak for just a moment?

12 THE COURT: That takes care of Philip Morris. You  
13 cannot speak for BAT?

14 MR. NATHAN: Correct.

15 THE COURT: With regard to BAT, what is your point?

16 MR. MALONE: If I may approach the bench. This is  
17 all which was hand delivered to Judge Nickerson yesterday and  
18 the reason it was delivered on an emergency basis, we've  
19 learned that representatives of BAT are in Aruba as of  
20 yesterday destroying and removing documents and the one matter  
21 we're agreeable to having this matter heard after the 10th, as  
22 per my agreement with Philip Morris defense counseled, but I  
23 want the Court to be aware it was our intention to immediately  
24 file an emergency motion as to BAT because they're destroying  
25 evidence today, so we ask that either Your Honor expand the



1 order to include BAT or we would -- which will -- I don't  
2 think --

3 THE COURT: I do not know that the Court has  
4 impersona jurisdiction over BAT.

5 MR. MALONE: Certainly as to the company such as  
6 Brown & Williamson, which is a named defendant and a U.S. -  
7 company, without doubt you had have jurisdiction over those  
8 companies. BAT may file a motion saying it does not have  
9 impersona jurisdiction. There have been rulings in this  
10 district, including by Judge Weinstein, where he specifically  
11 found that this court did have jurisdiction over all the BAT  
12 defendants that we have sued, so I think you will find --

13 THE COURT: Have they appeared?

14 MR. MALONE: In our case they have not appeared.

15 THE COURT: In those cases?

16 MR. MALONE: Yes, they have appeared and I think they  
17 are set for trial this month.

18 THE COURT: They haven't appeared here yet.

19 MR. MALONE: My point, if Your Honor is disinclined  
20 to extend our oral order to Philip Morris, I suggest that we  
21 will be filing an emergency motion in response to the current  
22 destruction by BAT.

23 THE COURT: Why don't you file a motion if you feel  
24 that is appropriate.

25 MR. MALONE: Yes, Your Honor.

1 THE COURT: Now, what we'll do it set down a date for  
2 full argument on the motion for the stay pending the outcome  
3 of the appeal in the Second Circuit in the Northern District  
4 case. It will have to be after the 10th of October.

5 Let's do it, October 11th at 2:00 p.m.

6 MR. NATHAN: That I will be fine, Your Honor.

7 THE COURT: Do I have all the papers now or are we  
8 going --

9 MR. NATHAN: I wanted to address that question.

10 MR. MALONE: I don't meant to interrupt.

11 THE COURT: Is that a bad time for you?

12 MR. MALONE: I am coming back on the 10th --

13 THE COURT: You need not say more. How about two  
14 weeks from today at 2:00 o'clock, the 13th.

15 MR. NATHAN: That would be fine.

16 THE COURT: Let's do it on the 13th of October at  
17 2:00 o'clock.

18 MR. NATHAN: Is it possible to do it in the morning,  
19 getting to Washington in late afternoon. I'm in Washington.

20 THE COURT: I have spent many years of my life  
21 commuting, you don't like commuting?

22 How much oral argument, would an hour and half be  
23 sufficient?

24 MR. MALONE: Yes, Your Honor.

25 MR. NATHAN: Yes.

1           THE COURT: Hopefully less. Let's do it at 10:00 on  
2 October 13th. If you make the 6:30 shuttle you will have  
3 plenty of time.

4           MR. NATHAN: I will come up the night before. There  
5 are two things with respect to the pleadings, Your Honor.

6           First, the plaintiffs have filed -- we filed a  
7 motion, they filed a motion in opposition, we filed our reply.  
8 They filed something that they denominated as a motion for an  
9 evidentiary hearing with respect to the stay, which were all,  
10 with due respect, Your Honor, simply surrebuttal to our reply  
11 brief and it's not the first time that we had the supported  
12 pleadings by them.

13           Unless the Court orders us to respond to that, I  
14 would like simply to let it go on the papers that you have and  
15 not have to respond to this purported motion, which will be  
16 filing as a surrebuttal to the argument. I don't want to be  
17 in default in not responding. We don't believe there is any  
18 need for an evidentiary hearing on the question of the stay  
19 and we're happy to submit it on the papers that have been  
20 presented to the Court.

21           THE COURT: You have no objection to my considering  
22 everything that I received?

23           MR. NATHAN: I urge you to consider everything there,  
24 but I'm just asking that we won't be in default for not  
25 responding to what we think needs no answer in rebuttal

1 papers.

2 THE COURT: When we review these papers, if we have a  
3 need for anything more, we'll call you.

4 MR. NATHAN: The one thing that I would like to file  
5 with the court, add to the record, is the materials in the  
6 Court of Appeals that shows the briefing schedule that is in  
7 the case in the RJR case. That is not in the record.

8 THE COURT: You informed me that oral argument is not  
9 happening until January of 2001 and I am aware that is on a  
10 regular schedule and not an expedited schedule. I don't need  
11 a letter. If everyone is in agreement that is the scheduled  
12 date in that other case, I don't need anything more on  
13 that.

14 MR. MALONE: That is fine, Your Honor.

15 MR. NATHAN: The last thing, our time by court order  
16 to respond to the motions-- to the complaint that is to move  
17 or answer was I think until October the 10th, and we've agreed  
18 that we postpone that waiting for the Court's hearing on the  
19 13th. What I would ask -- then the other side has agreed --  
20 if the Court denies the stay, that we have ten days after the  
21 13th or after the stay is denied--

22 THE COURT: Any objection to that --

23 MR. NATHAN: -- file our motion to dismiss.

24 MR. MALONE: I agreed that ten days after the hearing  
25 is fine with me. I suspect this is something that the Court

1 would tend to rule on relatively quickly and so the time  
2 between the ruling is close. If the ruling will take a month  
3 or two, then we'd ask that it be ten days from the date of the  
4 hearing. I cannot imagine that you will take ten days.

5 MR. NATHAN: We'll take ten days from the date of the  
6 hearing.

7 THE COURT: That is fine. If on the date of the  
8 hearing I tell you that I think it's going to be a lengthy  
9 period of time, before I make a decision, then we can discuss  
10 the timing fashion then, but it's my hope, obviously, that  
11 we'll be able to dispose of this particular motion in short  
12 order.

13 MR. NATHAN: Thank you.

14 MR. MALONE: Thank you.

15 THE COURT: Thank you.

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